

RECORDATION NO. 8809-D Filed & Recorded

MAY 23 1977 -12 05 PM

INTERSTATE COMMERCE COMMISSION



RECORDATION NO. 8809-B Filed & Recorded

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INTERSTATE COMMERCE COMMISSION
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ICC Washington, D.C.

May 18, 1977

Hon. Robert L. Oswald
Secretary
Interstate Commerce Commission
Washington, D. C. 20423

RECORDATION NO. 8809-C Filed & Recorded

MAY 23 1977 -12 05 PM

Dear Sir:

INTERSTATE COMMERCE COMMISSION

Enclosed for filing with and recording by the Interstate Commerce Commission are six copies each of the following documents:

First Amendment and Supplement to Conditional Sale Agreement made as of May 9, 1977 between ACF Industries, Incorporated and SSI Rail Corp.

Agreement and Assignment made as of May 9, 1977 between ACF Industries, Incorporated and Citibank, N.A.

Assignment of Lease and Agreement dated as of May 9, 1977 between SSI Rail Corp. and Citibank, N.A. This document assigns the Lease Agreement dated December 3, 1977 between SSI Rail Corp. and FMC Corporation (which was filed with the Interstate Commerce Commission on May 11, 1977 and assigned recordation 8809-A) to Citibank, N.A.

Also enclosed is our check in the sum of \$30.00, payable to the Interstate Commerce Commission, being the prescribed fee for filing and recording the foregoing documents.

These documents relate to that certain Conditional Sale Agreement made as of April 29, 1977, filed and recorded with the Interstate Commerce Commission and assigned recordation number 8809. Therefore, we respectfully request that the documents submitted herein be cross-referenced to the aforementioned Conditional Sale Agreement and assigned recordation numbers 8809-B, C and D.

Please return all additional copies of the enclosed counterparts not required by the Interstate Commerce Commission to the party delivering this letter on our behalf.

Very truly yours,

Handwritten signature of Nathan D. Goodman
Nathan D. Goodman
Secretary

AGREEMENT AND ASSIGNMENT ("this Assignment") made as of this 9th day of May, 1977, between ACF Industries Incorporated, a Delaware corporation (hereinafter called "Builder"), and Citibank, N.A. (hereinafter called "Assignee");

RECORDATION NO. 8809-C Filed & Recorded

W I T N E S S E T H:

MAY 23 1977-12 05 PM

INTERSTATE COMMERCE COMMISSION

Whereas, Builder and SSI Rail Corp., a Delaware corporation (hereinafter called "SSI,") heretofore entered into a conditional sale agreement made as of April 29, 1977, filed and recorded with the Interstate Commerce Commission and assigned Recordation No. 8809 as amended by the First Amendment and Supplement to Conditional Sale Agreement made as of May 9, 1977 (hereinafter called "the Conditional Sale Agreement,") providing for the construction, sale and delivery by Builder and the purchase by Railroad of one hundred (100) 100-ton, continuous hatch covered hopper cars, capacity 4650 cubic feet, AAR Mechanical Designation LO, numbered SSIX 1000 through 1099, inclusive (hereinafter called "the Equipment");

WHEREAS, Builder has delivered and SSI has accepted the Equipment; and

WHEREAS, the parties anticipated that the Conditional Sale Agreement and the right, title and interest of Builder in and to the Equipment would be sold and assigned to Assignee;

NOW, THEREFORE, in consideration of the premises and the sum of Two Million Four Hundred Forty-two Thousand One Hundred Eleven dollars and twenty cents (\$2,442,111.20) paid to Builder by Assignee, the receipt and sufficiency of which are hereby acknowledged, and of the covenants herein set forth, the parties agree as follows:

1. Builder hereby sells, assigns, transfers and sets over to Assignee, its successors and assigns, the following:

- (a) All the right, title and interest of Builder in and to the Equipment subject to the Conditional Sale Agreement; and

- (b) All right, title, interest, powers, privileges and remedies of Builder in, to and under the Conditional Sale Agreement (except payments heretofore made by SSI to Builder) including all amounts which may be or become due or owing under the Conditional Sale Agreement on account of the purchase price for the Equipment and the interest thereon and any other sums becoming due from SSI under the Conditional Sale Agreement;

without any recourse, however, against Builder for or on account of the failure of SSI to make any of the payments provided for in, or otherwise to comply with, any of the provisions of the Conditional Sale Agreement; provided, however, that this Assignment shall not subject Assignee to or transfer or pass or in any way affect or modify the obligations and warranties of Builder under the Conditional Sale Agreement or relieve SSI of its obligations to Builder under article 8 of the Conditional Sale Agreement, it being understood and agreed that notwithstanding this Assignment all obligations of Builder to SSI shall remain enforceable by SSI against and only against Builder. In furtherance of the foregoing assignment and transfer, Builder hereby authorizes and empowers Assignee in the Assignee's own name, or in the name of and as attorney for Builder, to ask, demand, sue for, collect, receive and enforce any and all sums to which Assignee is or may be entitled under this Assignment and compliance by SSI with the terms and agreements on its part to be performed under the Conditional Sale Agreement, but at the expense and liability and for the sole benefit of Assignee.

2. Builder hereby warrants to Assignee that it owns all the right, title, interest, powers, privileges and remedies of Builder in, to and under the Conditional Sale Agreement free from all claims, liens, security interests or prior assignment, and that it has a good right to assign and transfer the same as herein done. Builder hereby warrants to Assignee and SSI that it has legal title to the Equipment and good and lawful right to sell the same and that its title to the Equipment is free of all claims, liens, security interests or other encumbrances of any nature created by the act of the Builder, except only the rights of SSI under the Conditional Sale Agreement; and Builder does further covenant with Assignee and SSI that it will warrant and defend the title to the Equipment against the demands and claims of all persons, subject only to the rights of SSI under the Conditional Sale Agreement; and Builder further warrants that no unit of Equipment was delivered to SSI

under the Conditional Sale Agreement prior to the time that such unit was numbered and marked as provided in Section 6 of the Conditional Sale Agreement or prior to the time the Conditional Sale Agreement was filed and recorded with the Interstate Commerce Commission pursuant to Section 20c of the Interstate Commerce Act.

3. Builder agrees with Assignee that in any suit, proceeding or action brought by Assignee under the Conditional Sale Agreement for any amount due thereunder or to enforce any provision thereof, Builder will indemnify, protect and hold harmless Assignee from and against all expense, loss or damage suffered by reason of any defense, setoff, counterclaim or recoupment whatsoever claimed by SSI arising out of a breach or alleged breach by Builder of any obligation with respect to the Equipment or the manufacture, construction, delivery or warranty thereof or by reason of any other indebtedness or liability at any time owing to SSI by Builder or by reason of any act or omission of Builder. Builder's obligation so to indemnify, protect and hold harmless Assignee is conditioned upon (a) the Assignee's timely motion to strike any such defense, setoff, counterclaim or recoupment asserted by SSI, and (b) if the court or other body having jurisdiction denies such motion or other action and accepts such a defense, setoff, counterclaim or recoupment, Assignee's prompt notification to Builder and Assignee's giving Builder the right, at Builder's expense, to compromise, settle or defend against such defense, setoff, counterclaim or recoupment.

4. Except in cases of articles, materials and designs furnished or specified by SSI and not manufactured by Builder, Builder agrees to indemnify, protect and hold harmless Assignee from and against any and all liability, claims, costs, charges and expense, including royalty payments and counsel fees, in any manner imposed upon or accruing against Assignee because of the use in or about the construction or operation of any unit of Equipment of any such articles, materials and designs which infringes or is claimed to infringe on any patent or other right. Assignee will give prompt notice to Builder of any claim actually known to Assignee which is based upon any such alleged infringement and will give Builder the right, at Builder's expense, to compromise, settle or defend against such claim.

5. Builder agrees that any amount payable to it by SSI with respect to the Equipment, whether pursuant to the Conditional Sale Agreement or otherwise, and not hereby assigned to Assignee, shall not be secured by any lien, charge or security interest upon the Equipment.

6. Builder hereby represents and warrants to Assignee that the Conditional Sale Agreement was duly authorized and lawfully executed and delivered by it and insofar as Builder is concerned is a legal, valid and existing agreement binding upon Builder in accordance with its terms and is now in full force without further amendment or modification thereto.

7. Builder hereby agrees that it will from time to time at the Request of Assignee make, execute and deliver all such future instruments of assignment, transfer and assurance and do such further acts and things as may be necessary and appropriate to give effect to the provisions set forth herein and more perfectly confirm the right, title and interest hereby assigned and transferred to Assignee or intended so to be.

8. The terms of this Assignment and all rights and obligations hereunder shall be governed by the laws of the State of California, provided, however, that the parties shall be entitled to all the rights conferred by Section 20c of the Interstate Commerce Act.

9. This Assignment may be executed in any number of counterparts, but the counterpart delivered to Assignee shall be deemed to be the original counterpart.

IN WITNESS WHEREOF, the parties hereto, each pursuant to due corporate authority, have caused this Assignment to be executed in their respective corporate names by their duly authorized officers, and their respective corporate seals to be hereunto affixed and attested, all as of the date first above written.

ACF INDUSTRIES INCORPORATED

By *Dan A. Burns*
Its VICE PRESIDENT

ATTEST:

[Signature]
Its ASSISTANT SECRETARY
[CORPORATE SEAL]

CITIBANK, N.A.

By *[Signature]*
Its *[Signature]*

ATTEST:

[Signature]
Its
[CORPORATE SEAL]

relief of debts, against SSI or ITEL Corporation ("ITEL"), and if instituted against SSI or ITEL, are consented to or are not dismissed within sixty (60) days after such institution;

(d) A trustee or receiver is appointed for SSI or ITEL for the substantial part of its respective property and not discharged within sixty (60) days after such appointment;

(e) SSI or ITEL becomes insolvent or admits in writing its inability to pay its debts as they mature, or makes an assignment for the benefit of creditors or applies or consents to the appointment of a trustee or receiver for it or a major part of its respective property; or

(f) ITEL makes default in its obligations under its Take Out Commitment to Citibank, N.A. dated as of May 9, 1977 and Continuing Guaranty dated as of May 9, 1977.

SSI shall promptly notify Builder of any event which has come to its attention which constitutes or with the giving of notice or the lapse of time or both would constitute an event of default under this Agreement.

"At any time during which an event of default has occurred and is continuing, Builder may, at its option, exercise any one or more of the following rights and remedies:

(a) Declare the entire unpaid Conditional Sale Indebtedness together with interest thereon to be immediately due and payable without further demand and cause any lease of the Equipment then in effect to be immediately terminated, and upon such declaration, Builder shall be entitled to recover judgment for the entire unpaid balance of the Conditional Sale Indebtedness with interest thereon and expenses in connection therewith (including attorneys' fees), and to collect such judgment out of any assets of SSI wherever situated;

(b) Take immediate possession of the Equipment or any one or more units thereof without liability to return to SSI any sums theretofore paid and free from all claims whatsoever, and may remove the same from possession and use of SSI or any other person, and for such purpose

may enter upon the premises of SSI or other premises where the Equipment may be located and may use and employ in connection with such removal any supplies, services and aids and any available trackage or other facilities of SSI. If Builder shall designate a reasonable point or points for the delivery of the Equipment to Builder, SSI shall at its own expense and risk, forthwith in the usual manner cause the Equipment to be moved to and assembled at such location and shall there deliver the Equipment to Builder; and furnish for a period not to exceed 150 days, without charge or rent for storage, the necessary facilities at any point or points reasonably selected by Builder to store the Equipment until it has been disposed of by Builder. The agreements set forth in this subparagraph (b) are of the essence of this Agreement, and upon application to any court having equity jurisdiction, Builder shall be entitled to a decree of specific performance of such provisions. SSI hereby expressly waives any and all claims against Builder for damages of whatsoever nature in connection with any retaking of any unit of Equipment in a reasonable manner;

(c) Builder may elect to retain the Equipment in satisfaction of the unpaid Conditional Sale Indebtedness and interest thereon and dispose of the Equipment as Builder shall deem best. Builder shall give SSI written notice of its election to retain the Equipment at least thirty (30) days prior to any disposal of the Equipment by Builder;

(d) Builder may at its election and upon reasonable notice to SSI, with or without retaking possession of the Equipment, sell the Equipment or any one or more units thereof in one lot or in separate lots without the necessity of gathering at the place of sale the property to be sold free from any and all claims of SSI at public or private sale, provided that if SSI shall tender full payment of the total unpaid Conditional Sale Indebtedness together with interest thereon and expenses incurred by Builder in arranging for such sale (including reasonable attorneys' fees) the possession of and title to the Equipment shall pass to SSI. Builder may purchase at any such sale or sales.

The proceeds of any such sale or other disposition, less the attorneys' fees and any other expense incurred by Builder in retaking possession of, removing, storing, holding, preparing for sale and selling or otherwise disposing of the Equipment, shall be credited on the amount due to Builder under the provisions of this Agreement;

(e) Builder shall have and may exercise any of the rights and remedies of a secured party under the Uniform Commercial Code of California (regardless of whether such code or a law similar thereto has been enacted in a jurisdiction wherein the rights or remedies are asserted);

(f) Builder may exercise such one or more other rights it may have at law or in equity or otherwise to enforce its rights hereunder.

"SSI will pay all reasonable expenses, including attorneys' fees, incurred by Builder in enforcing its remedies under this Agreement.

"If after applying all sums of money realized by Builder under the remedies herein provided, there shall remain any amount due it under the provisions of this Agreement, SSI shall pay the amount of such deficiency to Builder upon demand, and if SSI shall fail to pay such deficiency, Builder may bring suit therefore and shall be entitled to recover a judgment therefore against SSI. If after applying the aforesaid all sums realized by Builder, there shall remain a surplus in the possession of Builder, such surplus shall be paid to SSI or to such person as may be entitled thereto.

"Each and every power and remedy hereby specifically given to Builder shall be in addition to every other power and remedy herein specifically given or now or hereafter existing at law or in equity, and each and every power and remedy may be exercised from time to time and simultaneously and as often and in such order as may be deemed expedient by Builder. All such powers and remedies shall be cumulative and the exercise of any one shall not be deemed a waiver of the right to exercise any other. No delay or omission of Builder in the exercise of any such power or remedy and no renewal or extension of payment hereunder

shall impair any such power or remedy or shall be construed to be a waiver of any default hereunder. Builder's acceptance of any payment after it shall become due shall not be deemed to alter or affect SSI's obligations hereunder with respect to any subsequent payments."

(6) Section 13 of the Conditional Sale Agreement, entitled Insurance, is hereby supplemented by adding at the end thereof the following:

"Such insurance shall name as an additional insured and loss payee Builder and shall provide that it cannot be canceled except upon thirty (30) days prior written notice to Builder."

(7) Section 14 of the Conditional Sale Agreement, entitled Governing Law, shall be supplemented by adding at the end thereof the following:

"Provided, however, that the parties shall be entitled to all rights conferred by Section 20c of the Interstate Commerce Act and any rights arising out of the marking on the units of the Equipment as herein provided."

(8) The Conditional Sale Agreement is hereby supplemented by adding as Section 18 thereof the following:

"18. Casualty Occurrence and Prepayment. In the event that any unit of Equipment shall be worn out, lost, stolen, destroyed, or irreparably damaged, from any cause whatsoever, or taken or requisitioned by condemnation or otherwise (such occurrences being herein called "Casualty Occurrences"), SSI shall promptly after it shall have determined that such unit has suffered a Casualty Occurrence, notify Builder fully as to the details thereof. On the next succeeding date upon which a quarterly installment becomes due, SSI shall promptly pay to Builder a sum equal to that portion of the purchase price of such unit remaining unpaid on the date of such payment plus interest accrued thereon as of such date. For the purpose of this section, each payment made in respect of the Equipment pursuant to paragraph 3 of this Agreement shall be deemed to be a payment on each unit of the Equipment in like proportion as the original purchase price of such unit bears to the aggregate original purchase price of the Equipment. Any money paid

to Builder pursuant to this paragraph shall be applied to prepay without penalty or premium, ratably in accordance with the unpaid balance of each installment, the Conditional Sale Indebtedness. Any condemnation payments or insurance proceeds, received by Builder in respect of a unit suffering a Casualty Occurrence shall be deducted from the amount payable by SSI to Builder in respect of such Casualty Occurrence. Upon the Payment by SSI to Builder of the sum required to be paid pursuant to this paragraph with respect to a unit of the Equipment suffering a Casualty Occurrence, title to such unit and the absolute right to possession thereof shall pass to SSI without further action on the part of Builder."

(9) The Conditional Sale Agreement is hereby supplemented by adding as section 19 thereof the following:

"19. Reports and Inspections. On or before March 31, in each year, commencing with the year 1978, SSI shall furnish to Builder an accurate statement (a) setting forth as at the preceding December 31, the amount, description and numbers of all units of Equipment then subject to this Agreement, the amount, description and numbers of any unit of Equipment that has suffered a Casualty Occurrence or has been withdrawn from use and such other information regarding the condition, use and state of repair of the Equipment as Builder may reasonably request, and (b) stating that the numbers and markings required by section 6 of the Conditional Sale Agreement have been preserved or replaced. Builder shall have the right to inspect the Equipment and SSI's records with respect thereto at any reasonable time.

"SSI will furnish to Builder (c) as soon as available and in any event within ninety (90) days after the end of the first, second and third quarterly accounting periods in each fiscal year of SSI, copies of the balance sheet as of the end of such accounting period and copies of the related statements of income and retained earnings of SSI for the portion of its fiscal year ending with the last day of such quarterly accounting period, all in reasonable detail and stating in comparative form the figures for the corresponding period in the previous fiscal year; and (d) as soon as available and in any event within 120 days after the end of each fiscal

year of SSI copies of the balance sheet of SSI and of the related statements of income and retained earnings for such fiscal year, all in reasonable detail and stating in comparative form the consolidated figures as of the end of and for the previous fiscal year, and certified by SSI's independent and public accountants."

(10) The Conditional Sale Agreement is hereby supplemented by adding as section 20 thereof the following:

"20. Prohibition Against Liens. SSI will pay or discharge all sums claimed by any party from, through or under SSI which if unpaid might become a lien, charge or security interest on or with respect to the Equipment or any unit thereof equal or superior to Builder's security interest therein, provided that SSI shall not be required to pay or discharge any such claim so long as the validity thereof shall be contested in good faith and by appropriate legal proceedings and the non-payment does not adversely affect the security interest of Builder in or to the Equipment."

(11) The Conditional Sale Agreement is hereby supplemented by adding as Section 21 thereof the following:

"21. Possession and Use. SSI, so long as an event of default shall not have occurred and be continuing hereunder, shall be entitled to the use and possession of the Equipment, but only upon and subject to all the terms and conditions of this Agreement. SSI shall not permit any unit of Equipment to be used in any service involving the regular operation and maintenance thereof outside the continental United States."

(12) The Conditional Sale Agreement is hereby supplemented by adding as section 22 thereof the following:

"22. Assignment. SSI shall, in order to provide security for the obligations of SSI under this Agreement, grant to Builder, concurrently with the execution of this First Amendment and Supplement, an assignment of the Lease in a form satisfactory to Builder, as and only to the extent that the Lease relates to Equipment numbered SSIX 1000-1099, inclusive. SSI represents and warrants that it has not made any assignment with respect to such Equipment and it shall not make any assignment with respect to the Lease of such Equipment to any party other than Builder."

(13) The Conditional Sale Agreement is hereby supplemented by adding as section 23 thereof the following:

"23. Notice. Any notice hereunder to any of the parties designated below shall be deemed to be properly served if delivered or mailed as follows:

(a) To Builder at:

750 Third Avenue
New York, New York 10017

(b) To SSI at:

Two Embarcadero Center
San Francisco, California 94111
ATTN: President

(c) To Assignee at:

399 Park Avenue
New York, New York 10022

or to such other address as may have been furnished in writing by such party to the other parties hereto."

(14) The Conditional Sale Agreement as hereby amended and supplemented is hereby ratified and confirmed.

(15) This instrument may be executed in any number of counterparts all of which shall constitute one and the same agreement.

IN WITNESS WHEREOF, the parties hereto have executed this instrument to be executed under the respective seals of the undersigned all as of the date first above written.

ACF INDUSTRIES, INCORPORATED

By Juan A. Buri
Title VICE PRESIDENT

ATTEST:

[Signature]
ASSISTANT SECRETARY

SSI RAIL CORP.

By [Signature]
Title Vice President

ATTEST:

State of New York)
County of New York) SS:

On this 26th day of May, 1977, before me personally appeared IVAN A. BURNS, to me personally known, who, being by me duly sworn, says that he is VICE PRESIDENT, of ACF Industries, Incorporated, that one of the seals affixed to the foregoing instrument is the corporate seal of said corporation, that said instrument was signed and sealed on behalf of said corporation by authority of its board of directors and he acknowledged that the execution of the foregoing instrument was the free act and deed of said corporation.

Olivia E. Walsh
Notary Public

[Notarial Seal]

OLIVIA E. WALSH
Notary Public, State of New York
No. 41-9500000 Qual. in Queens Co.
Certificate Filed in New York County
Commission Expires March 30, 1978

My Commission expires:

State of New York)
County of New York) SS:

On this 16th day of May, 1977, before me personally appeared John M. Brennan to me personally known, who, being by me duly sworn, says that he is Vice President of Citibank, N.A., that one of the seals affixed to the foregoing instrument is the corporate seal of said corporation, that said instrument was signed and sealed on behalf of said corporation by authority of its board of directors and he acknowledged that the execution of the foregoing instrument was the free act and deed of said corporation.

Rosemary Ferguson
Notary Public

[Notarial Seal]

ROSEMARY FERGUSON
Notary Public, State of New York
No. 41-7874785
Qualified in Queens County
Commission Expires March 30, 1978

My Commission expires:

ACKNOWLEDGMENT OF NOTICE AND CONSENT TO ASSIGNMENT

Receipt of a copy of, and due notice of the assignment made by, the foregoing Agreement and Assignment between ACF Industries, Incorporated and Citibank, N.A. and the terms and conditions set forth therein is hereby acknowledged and consented to as of May 18, 1977.

SSI RAIL CORP.

By: 

Donald H. Gleason
Vice President